nearly identical with the proviso to sub-section (i) of section 4 of the Criminal Appeal Act, 1907 which reads as follows :—

> Provided that the court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred.

The meaning of the expression "substantial miscarriage of justice" in the English proviso was considered by the Court of Criminal Appeal in the case of *Rex v. Cohen & Bateman*[3]. In that case Channel, J. in delivering the judgment of the Court said :—

> There is such a miscarriage of justice not only where the Court comes to the conclusion that the verdict of guilty was wrong, but also when it is of opinion that the mistake of fact or omission on the part of the judge may reasonably be considered to have brought about that verdict, and when, on the whole facts and with a correct direction, the jury might fairly and reasonably have found the appellant not guilty. Then there has been not only a miscarriage of justice but a substantial one, because the appellant has lost the chance which was fairly open to him of being acquitted, and therefore, as there is no power of this Court to grant a new trial, the conviction has to be quashed. If, however, the Court in such a case comes to the conclusion that, on the whole of the facts and with a correct direction, the only reasonable and proper verdict would be one of guilty, there is no miscarriage of justice, or at all events no substantial miscarriage of justice within the meaning of the proviso.

In the case of *Rex v. Haddy*[4] the Court of Criminal Appeal after quoting the above passage said :—

> That statement of the law has stood for 35 years and so far as we are aware has never been the subject of adverse comment.

The decision in *Rex v. Haddy* was approved by the House of Lords as a correct interpretation of sub-section 4 (i) of the Criminal Appeal Act in *Stirland v. Director of Public Prosecutions*[5]. The following is the relevant passage from the opinion of Lord Simon in the latter case :—

> A perverse jury might conceivably announce a verdict of acquittal in the teeth of all the evidence, but the provision that the Court of Criminal Appeal may dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred in convicting the accused assumes a situation where a reasonable jury, after being properly directed, would, on the evidence properly admissible, without doubt convict.

Although the appellant in this case retracted his statement at the trial we are satisfied, not only that his confession was in fact true, but also that had the assessors checked that confession in the light of all the evidence before them they would, as reasonable men, have come to the conclusion that it was true. Applying the law as we have stated it to this appeal we have no doubt that on the whole of the evidence and with the correct direction the assessors would without doubt have convicted.

Appeal Dismissed.

POON HEONG v. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Willan, C.J., Pretheroe, J. and Spenser-Wilkinson, J.) March 18, 1949]

[F.M. — Criminal Appeal No. 24 of 1949]

Emergency Regulations 1948, Regulations 4(1)(b) and 33 — Form of caution to be used before taking a statement — Whether failure to follow form of caution gives rise to substantial miscarriage of justice — Courts Ordinance 1948 S. 29(1).

In this case the appellant was convicted on a charge of being in possession of explosives. At the trial a statement made by the appellant to the Police after his arrest was admitted in evidence. It appeared that the caution used by the Police officer in this case was "You are not obliged to say anything, but anything you say may be given in evidence at your trial" instead of the proper form of caution "It is my duty to warn you that you are not obliged to say anything, or to answer any question, but anything you say whether in answer to a question or not, may be given in evidence at your trial".

Held, (1) that as the appellant had not been properly cautioned, the statement should not have been admitted in evidence at the trial; (2) that as in this case it was clear that no reasonable Assessors, after a proper summing up, and on the rest of the evidence, could have failed to have come to the conclusion that the appellant was guilty of the offence charged, there was no substantial miscarriage of justice and the appeal must be dismissed.

Cases referred to :—

(1) *Cheng Seng Hong & others v. Public Prosecutor* (1949) M.L.J. 67.

(2) *Public Prosecutor v. Lee Weng.* Raub Criminal Trial No. 3 of 1949 (unreported).

(3) *R. v. Baldry* (1852) 21 L.J.M.C. 130.

CRIMINAL APPEAL.

P. J. D. Regester for the Appellant.

A. M. I. Austin (D. P. P.) for the Respondent.

The judgment of the Court of Appeal was delivered by :—

Willan, C. J. : — The appellant was charged with being in possession of explosives, namely two detonators, one fuse and about 2 ounces of gun cotton at the 23rd mile on the Manchis Road in the State of Pahang, on or about the 20th January, 1949, an offence contrary to Regulation 4(1)(b) of the Emergency Regulations, 1948. He was convicted and sentenced to death.

At the trial the prosecution tendered in evidence a statement made by the appellant to the police after

his arrest on the 20th January, 1949. In that statement the appellant admitted being in possession of the above mentioned explosives. The statement was admitted in evidence by the learned trial Judge.

Before us, Mr. Regester, for the appellant, submitted that the statement should not have been admitted in evidence because, prior to making it, the appellant had not been properly cautioned by the police officer who recorded the statement.

The caution which was administered to the appellant by that police officer was as follows :—

> You are not obliged to say anything, but anything you say may be given in evidence at your trial.

That form of caution in Regulation 33 of the Emergency Regulations, 1948, was in force until the 10th January, 1949. On that date, that is ten days before the statement was made by the appellant, the form of caution was amended. Since the 10th of January, 1949, the law regarding a caution is as follows :—

> Provided that no such statement shall be admissible or used as aforesaid —
>
> .....
>
> (b) in the case of a statement made by such person after his arrest, unless the Court is satisfied that, before making such statement, a caution was administered to him in the following words or words to the like effect: 'It is my duty to warn you that you are not obliged to say anything, or to answer any question, but anything you say whether in answer to a question or not, may be given in evidence at your trial'.

The words underlined were added by the amendment on account of the decision of this Court in *Cheng Seng Hong & others v. P. P.*[1].

Hence the police officer administered the caution to the appellant in the unamended form, and in doing so omitted to include the words underlined above.

The point for decision was whether this omission rendered the statement admissible in evidence.

Mr. Austin, Federal Counsel, argued that even though the caution had not been administered in the form prescribed by Regulation 33 of the Emergency Regulations, 1948, after amendment, it was sufficient because :—

(1) Regulation 33 provides that words "to the like effect" can be used;

(2) The whole effect and intention of the caution must be looked at and not the actual words used;

(3) Since the appellant had not been questioned by the police officer when he made his statement there was no harm in excluding from the caution administered any reference to questions.

With regard to (1) we agree with that part of the judgment of Spenser-Wilkinson J. in the case of *P. P. v. Lee Weng*[2], in which a similar point arose, that in order to be "to the like effect" the caution prescribed by the Emergency Regulations, 1948, must be administered in full, although it is not essential to be in exactly the precise form prescribed.

As regards (2) Mr. Austin relied on the case of *R. v. Baldry*[3] that in England it is not essential to use any set form when a caution is administered by a police officer, so long as words are not used which might import a threat, inducement or promise.

In our view English decided cases on this question cannot be applied in this country because in England there is no statutory form of caution. We agree with that part of the judgment of Spenser-Wilkinson J. in *P. P. v. Lee Weng* (*supra*) which reads :—

> "The amendment of Regulation 33 followed a decision of the Court of Appeal to the effect that under that Regulation as it then stood questions should not be asked in eliciting a statement thereunder. It has been thought right by amending the law to allow questions to be put in taking such statements, but in making the change the legislature has been careful to lay down certain pre-requisites before the statement may be taken. I think the emphatic repetition of the reference to questions in the amended Regulation is deliberate and that the words have been inserted in both parts of the caution for two reasons; the first is that suggested by Mr. Chia, namely, that the first part of the caution up to the comma is the actual warning part, whereas the latter part merely indicates the use to which the statement may be put; and the other is that, if questions are to be allowed, the provisions of paragraph (2) of the Regulation have to be emphasised because otherwise an accused person familiar with the normal law under section 112 of the Criminal Procedure Code, but unfamiliar with the Regulations might think that he was legally bound to answer the questions and to answer them truly. Section 112 has existed for so long that such a state of mind could not, I think, be considered unreasonable."

As to (3) a police officer cannot be allowed to change a statutory form of caution merely because he does not propose to ask an accused person any questions.

For these reasons we decided that the statement should not have been admitted in evidence at the trial of the appellant.

In view of that decision Mr. Regester urged that there should be a new trial because the Assessors might not have expressed their opinions that the appellant was guilty if the statement made by the appellant had not been admitted in evidence.

In our view this was a case in which it was appropriate to apply the proviso to section 29(1) of the Courts Ordinance, 1948, because having examined the whole of the trial record we came to the conclusion that it was clear that no reasonable Assessors, after a proper summing up, and on the rest of the evidence to which no objection could be taken, could have failed to have come to the conclusion that the appellant was guilty of the offence charged.

Appeal Dismissed.